

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE NATIONAL PRESCRIPTION
OPIATE LITIGATION
This document relates to:
Track One Cases

MDL 2804
Case No. 17-md-2804
Hon. Dan Aaron Polster

**PLAINTIFFS' MOTION FOR LEAVE TO FILE SUR-REPLY TO
DISTRIBUTORS' CONSOLIDATED REPLY IN SUPPORT OF MOTIONS
FOR SUMMARY JUDGMENT ON PLAINTIFFS' CIVIL CONSPIRACY,
RICO AND OCPA CLAIMS
(Dkt. # 1904, 2183)**

Plaintiffs Summit and Cuyahoga County respectfully move this Court for leave to file a short sur-reply to Distributors' Consolidated Reply in Support of Motions for Summary Judgment on Plaintiffs' Civil Conspiracy, RICO and OCPA Claims ("Distributors' RICO Reply").¹ Distributors' RICO Reply makes new arguments not previously raised in their Memorandum in Support of Distributor Defendants' Motion for Summary Judgment on Plaintiffs' RICO and OCPA Claims (Dkt. 1904) to which Plaintiffs request leave to file a short response. The proposed sur-reply is attached as Exhibit A.

A sur-reply is warranted in this instance because Distributors have raised new arguments in Distributors' RICO Reply. *Mirando v. U.S. Dep't of Treasury*, 766 F.3d 540, 548 (6th Cir. 2014) (when moving party submits new reasons in support of summary judgment in a reply brief "the district court should allow the nonmoving party an opportunity to respond"); *Seay v. Tennessee Valley Auth.*, 339 F.3d 454, 481 (6th Cir. 2003) ("When new submissions and/or arguments are included in a reply brief, and a nonmovant's ability to respond to the new evidence has been vitiated, a problem arises with respect to Federal Rule of Civil Procedure 56(c)."); *Filtrex Int'l, LLC v. Truelson*, No. 5:12CV58, 2013 WL 587582, at *1 (N.D. Ohio Feb. 13, 2013) ("Because the defendants make new arguments ... in their reply brief ... the Court finds good cause for the plaintiff to file its surreply."). As this Court has today recognized, when defendants fail to develop an argument in their initial briefing, the Court should "decline[] to address arguments raised for the first time in Defendants' reply brief." Dkt. 2492, Opinion and Order Denying Motion to Exclude Keller at 3 n. 1 citing *Ross v. Choice Hotels Int'l, Inc.*, 882 F. Supp. 2d 951 (S.D. Ohio 2012) ("a reply brief is not the proper place to raise an issue for the first time").

¹ Distributors' RICO Reply has not yet been filed on the docket.

Specifically, Distributor Defendants are now attempting to challenge the predicate acts element of RICO² – while trying to couch it as part of their causation argument – after failing to dispute this element when they originally moved for summary judgement. *See* Distributors' RICO Reply at 19-21. Distributors' RICO Reply contends that Plaintiffs have abandoned both categories of predicate acts pled in their complaints: (1) mail and wire fraud and (2) knowingly or intentionally furnishing false or fraudulent information, and/or omitting material information from, documents filed with the DEA. *Id.* at 19-20. This is not the case. Plaintiffs did not make arguments on the predicate acts in Plaintiffs' Consolidated Memorandum in Opposition to Defendants' Motions for Summary Judgment on Plaintiffs' Civil Conspiracy, RICO and OCPA Claims ("Plaintiffs' Opposition") (Dkt. 2183) because Defendants did not adequately raise or develop them in their initial motion and briefing; instead, Plaintiffs limited their response to the elements that Defendants actually challenged. Plaintiffs seek leave to file a short sur-reply to ensure the record is clear that they are not abandoning these categories of predicate acts. Contrary to Distributor's contention, one sentence in Plaintiffs' Opposition stating that Defendants failed in their obligation to stop shipments of suspicious orders, which would have prevented Plaintiffs' injury, (Dkt. 2183 at 97), is not the equivalent of "asserting a new RICO theory based on shipping for the first time in their summary judgment opposition." Distributors' RICO Reply at 21.

Plaintiffs are not changing or abandoning their theories on the predicate acts Defendants committed as part of their extensive pattern of racketeering activity. Defendants did not dispute these acts on summary judgment, thus precluding Distributors from raising this challenge now.

² RICO requires a plaintiff to demonstrate: (1) the existence of an enterprise; (2) control or participation in the enterprise's conduct; (3) through a pattern; (4) of racketeering activity (the "predicate acts"); (5) causation; and (6) injury to business or property. 18 U.S.C. § 1962(c); *see also In re ClassicStar Mare Lease Litig.*, 727 F.3d 473, 483 (6th Cir. 2013). Defendants only sought summary judgment on their claims that Plaintiffs failed to offer evidence on enterprise, control or participation, causation, and damages. *See* Dkt.1904.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant them leave to file a sur-reply to Distributors' RICO Reply.

Dated: August 20, 2019

Respectfully submitted,

/s/Paul J. Hanly, Jr.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of August 2019, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF System. Copies will be served upon counsel of record by, and may be obtained through, the Court CM/ECF Systems.

/s/Mark P. Pifko
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